Supreme Court, U.S.
FILED

No. 992004 JUN 14 2000

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1999

GALO VELASTEGUI
and GMJ TRAVEL & SHIPPING CORP.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SECOND CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

RAYMOND AAB
CAROL KAHN and
LUIS VELEZ
Attorneys for Petitioners
120 Broadway
New York, New York 10271
(917)551-1300

PRINTINGHOUSE PRESS 25 WEST 43RD STREET NEW YORK, NY 10036 (212) 719-0990

46pp

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES SUPREME COURT

QUESTIONS PRESENTED

1. Is the federal statute regulating the conduct of illegal money transmitting businesses unconstitutionally vague when incorporating by reference ambiguous state statutes defining and regulating the money transmittal business?

2. Should the rule of lenity be applied where the relevant state statute is ambiguous?

3. Should a state administrative's agency definition of a money transmitting business be applied retroactively to conduct that predated the agency's opinion, such as to render the pre-opinion conduct criminal?

4. Did the Circuit Court err in deeming a rule of lenity issue, based on an ambiguous state statute, to be a question of fact for trial rather than a question to be resolved by the Legislature's amendment of the relevant statute?

PARTIES BELOW

The parties below in the Court whose Judgment is sought to be reviewed are as follows:

United States of America, Appellee

Galo Velastegui and GMJ Travel & Shipping Corp., Defendants-Appellants

The Defendant Galo Velastegui is the sole shareholder and principal of the Defendant Corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

RELEVANT STATUTES & CONSTITUTIONAL PROVISIONS v

INDEX TO APPENDIX vi

JURISDICTIONAL STATEMENT vii

STATEMENT OF THE CASE 1

LEGAL ARGUMENT

POINT I
18 U.S.C. 1960 IS UNCONSTITUTIONALLY VAGUE WHEN APPLIED TO AGENTS OF LICENSED MONEY TRANSMITTERS WHO THEMSELVES DO NOT REQUIRE LICENSES 6

POINT II
THE RULE OF LENITY WAS PROPERLY APPLIED BY THE TRIAL COURT 7

TABLE OF CONTENTS
continued

POINT III
THE CIRCUIT COURT IMPROPERLY FOUND CONTROLLING AN OPINION BY THE STATE AGENCY RENDERED AFTER THE INDICTMENT IN THIS CASE AND APPLIED THAT OPINION RETROACTIVELY TO CONDUCT THAT PREDATED THE OPINION 9

POINT IV
THE SECOND CIRCUIT ISSUES AN UNCONSTITUTIONAL REMEDY BELOW, TREATING A LAW OF LENITY PROBLEM, A PURE LAW ISSUE REQUIRING LEGISLATIVE CORRECTION OF A VAGUE STATUTE UNDER THE SEPARATION OF POWERS CLAUSE OF THE UNITED STATES CONSTITUTION AS A FACT ISSUE FOR TRIAL: DID THE DEFENDANT OBJECTIVELY BELIEVE HIS CONDUCT WAS ILLEGAL 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Callahan v. U.S., 364 U.S. 587 (1961) 8

McBoyle v. U.S., 283 U.S. 27 (1931) 7

Ratzlaf v. U.S., 510 U.S. 135 (1994) 7,10

Rewis v. U.S., 401 U.S. 808 (1971) 8

U.S. v. Brennan, 183 F.3d 139 (2d Cir. 1999) 7

U.S. v. Cambio Exacto, 166 F.3d 522 (2d Cir.1999) 7

U.S. v. Lanier, 520 U.S. 259 (1997) 8

STATUTES

18 U.S.C. 1960 1,5,7,8

18 U.S.C. 1960(b)(1) 8

18 U.S.C. 1960(b)(1)(A) 9

New York State Banking Law Section 648 2

INDEX OF APPENDIX

Appendix A:

Order in United States of America v. GALO VELASTEGUI, a/k/a Galo R. Velastegui, and GMJ TRAVEL & SHIPPING CORP., dated December 13, 1999 ..... A1

Appendix B:

Decision in UNITED STATES OF AMERICA v. GALO VELASTEGUI, also known as Galo R. Velastegui, and GMJ TRAVEL & SHIPPING CORP., dated December 13, 1999 . A3

Appendix C:

Decision in UNITED STATES OF AMERICA v. GALO R. VELASTEGUI and GMJ TRAVEL & SHIPPING CORP., dated April 28, 1999 .... A13

JURISDICTIONAL STATEMENT

This is an appeal from a determination of the United States Court of Appeals for the Second Circuit following a motion for rehearing *en banc* of that Court from a decision of the Second Circuit panel dated December 13, 1999 that reversed the Order and Judgment of the United States District Court (Scheindlin, DJ) which Order and Judgment dismissed two counts of a three count indictment against the Defendants.

Following the District Court's dismissal of those counts, the government took an interlocutory appeal to the Second Circuit Court of Appeals which reversed the District Court. The Defendants then moved the Second Circuit Court of Appeals for a rehearing *en banc,* which the Second Circuit denied in its mandate dated March 13, 2000.

This Court has jurisdiction to review this petition under Supreme Court Rule 13 since this petition is made within 90 days of an entry of an order denying rehearing of a criminal decision in the Second Circuit Court of Appeals.

UNITED STATES SUPREME COURT

GALO VELASTEGUI and GMJ TRAVEL & SHIPPING CORP.,

Defendants-Appellants,

against

UNITED STATES OF AMERICA,

Appellee.

WRIT PETITION Under Supreme Court Rule 14

WRIT OF CERTIORARI UNDER SUPREME COURT RULE 14

GALO VELASTEGUI and GMJ TRAVEL & SHIPPING CORP., (hereinafter "Defendants"), by their counsel RAYMOND J. AAB, CAROL KAHN and LUIS VELEZ, bring the instant writ of certiorari to review constitutional defects in the ruling and order of the Second Circuit Court of Appeals as reflected in the court's decision entered on December 13, 1999 and its mandate dated March 13, 2000.

Statement of the Case

Government agents arrested and charged the Defendants with conducting an "illegal money transmitting business" in violation of 18 U.S.C. 1960 and with structuring their cash deposits at the bank. Following comprehensive motion practice the District Court dismissed the money transmittal count in its decision dated April 28, 1999. The thrust of the District Court's decision was that the relevant federal statute was

unconstitutionally vague and the Court applied the rule of lenity in dismissing the two money transmittal counts against the Defendants.

The Defendant GMJ Travel & Shipping Corp. (GMJ) is a New York corporation; Galo Velastegui is its sole shareholder and principal. At all times relevant in this case, GMJ was an agent of a duly licensed money transmitter, lawfully licensed to conduct such business under the New York State Banking Law. Under the New York State Banking Law Section 648, agents of licensed money transmitters do not themselves require a money transmittal license.

In conducting the money transmittal business, customers of GMJ, usually Mexican-Americans, would deposit on average approximately $300 for transmittal to their beneficiaries in Mexico. It has not been alleged and it is not disputed that all of the monies involved in this case where clean monies and did **not** involve any funds connected with any illegal operations or enterprise such as drug trafficking, money laundering or tax evasion.

Under the New York Banking Laws, the agents of licensees could collect money from customers for transmittal to designees in foreign countries. However, the various contracts between the agents and their principals as well as banking regulations provide that the agent deposit the customers' monies into the principal's bank account, so that the principal could then transmit the monies to the beneficiary. The purpose of the state statute was to allow the state banking department to protect the interest of the consumer or customer of the agent, so that if the agent for example embezzled the funds, the agent's customers would have recourse against the principal. Thus, if this policy were not followed and it were determined (as did the Second Circuit Court of Appeals in this case) that the agent acted outside the scope of his agency and was conducting a separate, distinct and independent money transmittal business when the agent transmitted monies directly to the foreign country, ironically, the

customers would have no recourse against the principal and they would be left losing the funds deposited with the agent.

Under the applicable New York State Banking law, the agent of the principal does not itself require a separate license from the New York State Banking Department. As reflected in the decisions by the Court of Appeals and the District Court, GMJ in this case transmitted monies to designees in Mexico both directly and through its principal/licensee after depositing its customers' funds with GMJ's principal for transmission to the customers' designees in Mexico. The transmittals that are complained of and are the subject of the indictment in this case were transmissions for the most part made more than one year prior to the Defendants' arrest and indictment. The funds being sought by the government are the funds that the agent had on hand at the time of the indictment which were completely separate and distinct from those funds that were allegedly subject of illegal transmissions more than one year prior to the indictment. Indeed, the funds on deposit with the Defendants for the most part represented the cash deposits made by the GMJ's customers within days of the Defendant's arrest. Those funds were not alleged to have been involved in any illegal money transmitting. Further, the New York State Banking Department, at the time of the transmittals had never issued any opinion concerning the criminality involved in an agent's directly transmitting funds to a foreign country (as opposed to depositing those funds with the agent's principal, which then transmitted the funds to the foreign country). Only after the indictment and following motion practice in this case and at the request of the government, did the New York State Banking Department issue such an opinion, which opinion the Second Circuit Court of Appeals relied on in rendering its opinion reversing the District Court.

The Decisions

The District Court dismissed the money transmitting counts of the indictment in a reasoned 18 page decision, which is appended hereto. The thrust of the District Court's reasoning is

that the Defendant could not have noticed that they violated the federal statute based upon an ambiguous state statute which has never before been interpreted by any court. This was a case of absolute first impression and the District Court reasoned that the Defendants could not have been on notice that in directly transmitting monies to beneficiaries in foreign countries, instead of first depositing those monies with GMJ's principals for transmission to the foreign countries, GMJ was violating a federal criminal statute. In order to have found that the federal criminal statute was violated, a finding would first have to be made that the Defendant was conducting an "illegal money transmitting business". Since the agent GMJ itself did not require a license and was operating at all times under the license of its duly authorized principal, the Court reasoned that any interpretation that it was conducting an illegal money transmitting business was unconstitutionally vague and the court applied the rule of lenity in dismissing the counts.

The Second Circuit Court of Appeals in reversing the District Court reasoned that the Defendants were conducting in essence two money transmittal businesses; one a legal one where the Defendant/agent deposited customers' monies with the authorized principal for transmission to the foreign country. In the other, the Defendant/agent transmitted its customers' monies directly to the foreign country.

The Precedential Implication of the Second Circuit's Ruling

If the Second Circuit ruling in this case were to remain, then innumerable agents of licensed principals who transmit their customers' funds directly to a foreign country without first depositing the clients' funds into the principal's bank account, would be guilty of a federal crime subject to jail and to massive forfeitures and fines. In the instant case, the government is seeking to forfeit some three million dollars representing all of the monies that the Defendant transmitted abroad on behalf of its customers. Those funds were not the agent GMJ's monies; rather, they represented customers' monies and the Defendant/agent was

a mere conduit for the transmittal of those funds to the customers' beneficiaries, usually in Mexico in this case.

The effect of the Second Circuit ruling is to injure the customer and the "little people" who send on average $300 to their families in foreign countries. If the Second Circuit's determination were to remain the law it would leave these customers without any remedy whatsoever against the agent's principal in the event that the agent should wrongfully convert the customers' funds to its own use or otherwise not have the funds because the government seized them. In such cases if the customers could not recover from the agent, when it would otherwise traditionally and under the public policy of New York, be permitted to do so. Since 18 U.S.C. 1960 only makes it a federal crime to operate an illegal money transmittal business - as defined by state law- clearly Section 1960 must be intended to defer to the State policy. As indicated, that State policy is to protect the "little people" depositors and not to forfeit these innocent customers' monies to the federal treasury.

Were the Second Circuit's determination to be reversed, the government would not be without remedy in event that the agent committed other criminal acts such as money laundering or tax evasion nor would the state be without remedy. It could fine the parties (as it has routinely done in these kinds of cases), or it could - - after a hearing - - even terminate the money transmittal license. The state's regulations allow it various options after a hearing, but they do not allow for the automatic termination of the license or the principal agency relationship. And, any violation of the state's criminal laws are always subject to prosecution. However, in order to render the relevant federal statute 18 U.S.C. 1960 applicable, the Defendant must conduct an "illegal money transmitting business" and not merely be committing some other crime.

The impact on the money transmittal business in New York and other jurisdictions is huge and affects hundreds of money transmitting business and hundreds of millions of dollars

transmitted by agents directly to beneficiaries in foreign countries. This is not to say that any agent should violate an agency rule or a contractual provision by transmitting monies directly to designees in foreign countries, but when considering the very important issues in this case, the impact on the innocent customers and their lack of recourse against the agent's licensee/principal must be considered. The way to remedy the deficiencies in the statute is for the U.S. Congress to amend them, and not for the Court's writing new statutes.

LEGAL ARGUMENT

Point I:

18 U.S.C. 1960 IS UNCONSTITUTIONALLY VAGUE WHEN APPLIED TO AGENTS OF LICENSED MONEY TRANSMITTERS WHO THEMSELVES DO NOT REQUIRE LICENSES

As previously indicated, under New York law a money transmitter obtains a license from the New York State Banking Department after passing scrutiny and depositing a five hundred thousand dollar bond. That licensee may then employ any number of agents which themselves do not require separate licenses. It is the practice that the agents and their licensed principals would execute a written agency agreement. Those agency agreements generally provide for many obligations on the part of both parties including the obligation of the agent to deposit money it receives from its client with its principal for transmission by the principal to the appropriate designees in the foreign country. The rules of the Banking Department have similar provisions and list many additional obligations, such as one requiring the agent to display a sign indicating the name of its principal and also requiring that the principal's name be reflected on the agent's letterhead. Thus, were the agent to convert its clients' monies, or if the government seized or forfeited those same monies, under the interpretation by the Second Circuit Court of Appeals, the customers would be left without redress against the

principal. The purpose and policy behind the banking regulations is to protect the customer and allow the customer redress against the principal. That could only be accomplished in instances such as the one at issue, if the Second Circuit's determination is reversed and the District Court's decision is reinstated.

The relevant statute 18 U.S.C. 1960 fails to give clear, adequate and fair notice that the Defendant's conduct constituted an illegal business of money transmitting. Additionally, GMJ's conduct is outside the intent of the federal statute since it is not connected to money laundering (which is the intent of 18 U.S.C. 1960), and the government does not dispute that GMJ's clients received the transmitted monies which is *raision d'etre* for the banking law's licensing and bonding requirement. U.S. v. Cambio Exacto, 166 F.3d 522, 525 (2d Cir. 1999). If a federal statute is vague or unclear and doesn't address GMJ's situation, then it is the providence of the legislature and not the court, to create a new statute or to amend the old ones. Ratzlaf v. U.S., 510 U.S. 135, 148, (1994) citing, McBoyle v. U.S., 283 U.S. 27 (1931). These decisions forbid courts from filling in gaps in ambiguous statutes and retroactively punishing defendants for acts that weren't clearly wrong as the statute was written. It is wrong and abusive for the government to seek to incarcerate, fine and to forfeit monies equal to all of the funds the Defendant transmitted on behalf of its customers more than one year prior to the indictment, all of which clients monies were clean and were not tied to money laundering, drugs, all because of the government's arcane interpretation of what is an "appropriate" license.

Point II:

THE RULE OF LENITY WAS PROPERLY APPLIED BY THE TRIAL COURT

The Courts have been sympathetic to protect persons in complex relationship from unclear and ambiguous criminal statutes, applying the rule of lenity to do so. U.S. v. Brennan, 183

F.3d 139 (2d Cir. 1999). Lenity is a statutory construction rule applicable in criminal cases where the terms of the criminally construed statute are ambiguous. Callahan v. U.S., 364 U.S. 587, 596 (1961). In the instant case, there are two statutory schemes being interpreted, each with a different intent and purpose. The federal statute at issue, 18 U.S.C. 1960, is earmarked to detect money laundering and related criminal conduct involving tainted funds; the relevant state statute on the other hand is devised to protect the customers of the money transmitters. In protecting such customers, the state banking rules and regulations do not automatically terminate a licensee's or agent's authority, even on the commission of a misdemeanor by the agent. Under the 18 U.S.C. 1960(b)(1), facially, the only misdemeanor that has relevance to that statute is one that involves the unlicenced operation of money transmittal business; and importantly, an agent's commission of a misdemeanor such as larceny, money laundering, drug trafficking, tax evasion does not itself automatically terminate the agency relationship and does not and cannot violate 18 U.S.C. 1960.

The rule of lenity mandates that ambiguous criminal statutes be interpreted to protect an unsuspecting, unknowing defendant; otherwise, due process is lacking. This point was very amply explained by the Trial Court in its decision dismissing the money transmitting counts. Rewis v. U.S., 401 U.S. 808 (1971) and U.S. v. Lanier, 520 U.S. 259, 266 (1997):

> "First. The vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . . Second as a sort of junior version of the vagueness doctrine the rule of lenity ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. . . Third . . . due process bars courts from applying a novel

construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has disclosed to be within its scope. Consequently, the Lanier court defined the standard for a fair notice inquiry as "whether the statute either standing alone or as reasonably construed made it reasonably clear at the relevant time that the conduct was criminal".

As the Trial Court herein found, the question at issue here is one of very first impression. Given the lack of any case law precedent as well as the total lack of annotations concerning the meaning of what is an "appropriate" license as referenced in 18 U.S.C. 1960 (b)(1)(A), this is clearly a first instance question the Defendant should not be made to guess or anticipate what ultimately an Appeals Court would rule on the case. If the District Court could not understand that the federal statute clearly applied to the facts in this case and rendered the Defendants operation of its business illegal then how could somebody in the Defendants' position be faulted for reasoning consistent with that of a federal judge, especially when no prior administrative or legal decision or opinion in the entire country existed with respect to the issues extant in this matter.

Point III:

THE CIRCUIT COURT IMPROPERLY FOUND CONTROLLING AN OPINION BY THE STATE AGENCY RENDERED AFTER THE INDICTMENT IN THIS CASE AND APPLIED THAT OPINION RETROACTIVELY TO CONDUCT THAT PREDATED THE OPINION

The Second Circuit found relevant and controlling an opinion written by the Department of Banking at the request of the government during motion practice and after indictment in this case. That opinion stated that the conduct of the agent which

transmits money directly to its customer designees in a foreign country is criminal. The Court applied that opinion which was unsupported by any judicial decision in New York or any other jurisdiction to the facts in this case which predated that opinion by more than two years.

The Trial Court found that such May 1999 state administrative opinion of the Superintendent's regulations (which the government introduced in its motion for reconsideration before the trial court) does not and could not put Defendants on notice that their prior conduct was criminal under the federal statute. It was wrong for the Circuit Court to have done so and it places the Defendants in an untenable position of having a prior administrative opinion used to render earlier conduct criminal.

Point IV:

THE SECOND CIRCUIT ISSUES AN UNCONSTITUTIONAL REMEDY BELOW, TREATING A LAW OF LENITY PROBLEM, A PURE LAW ISSUE REQUIRING LEGISLATIVE CORRECTION OF A VAGUE STATUTE UNDER THE SEPARATION OF POWERS CLAUSE OF THE UNITED STATES CONSTITUTION AS A FACT ISSUE FOR TRIAL: DID THE DEFENDANT OBJECTIVELY BELIEVE HIS CONDUCT WAS ILLEGAL.

The Circuit's choice of remedy to remand for trial on the issue of whether the Defendant objectively understood that he was operating an illegal money transmittal business would convert all law of lenity problems into fact issues for trial, thereby eliminating the law of lenity doctrine. See, the Circuit's Decision, footnote 4. The Circuit doesn't have the power to overrule the Supreme Court in Ratzlaf and undermine the Separation of Powers doctrine. The Circuit ignored that there was no prior precedent defining illegal money wiring business in the context of New York Law, that

affirmatively states that an agent of a licensed principal does not need a separate license.

Should the Circuit's decision below would remain the controlling law, it could be used to federally prosecute every sort of (non-money transmitting) business agent of a state licensed principal, where the scope of the agent's de facto authority and has never been established by state or federal criminal statute, such as the wide ranging application to safety violations involving transportation, and worker-safety agencies.

CONCLUSION

FOR THE REASONS STATED THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
June 8, 2000

Yours, etc.

RAYMOND AAB
CAROL KAHN and
LUIS VELEZ
Attorneys for Petitioners
Galo Velastegui and GMJ Travel & Shipping Corp.
120 Broadway, 29th Floor
New York, New York 10271
(917)551-1300

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK, 10007

MANDATE

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 13th day of December, one thousand nine hundred and ninety-nine.

BEFORE:	Hon. James L. Oakes	Unites States
	Hon. Rosemary S. Pooler	Court of Appeals
	Hon. Robert A. Katzmann	Second Circuit
		Filed December
	Circuit Judges	13, 1999

Docket No. 99-1362

United States of America,
Appellant,

-against-

GALO VELASTEGUI, a/k/a Galo R. Velastegui,
and GMJ TRAVEL & SHIPPING CORP.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Souther District of New York and was argued by Counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED, and DECREED** that the orders of said district court be and they hereby are reversed in accordance with the opinion of this court.

FOR THE COURT
Karen Greve Milton, Acting Clerk
By:

/S/

Beth J. Meador
Administrative Attorney

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued October 26, 1999 Decided December 13, 1999)
Docket No. 99-1362

UNITED STATES OF AMERICA,

Appellant,

--V.--

GALO VELASTEGUI, also known as Galo R. Velastegui, and GMJ TRAVEL & SHIPPING CORP.,

Defendants-Appellees.

Before:

OAKES, POOLER and KATZMANN,

Circuit Judges.

The United States charges Galo R. Velastegui and GMJ Travel & Shipping Corporation with engaging in an unlawful money transmitting business. The United States District Court for the Southern District of New York (Scheindlin, *J.*) Dismissed counts one and two of the indictment. The United States appeals the district court's ruling.

Reversed.

PETER B. SOBOL, Assistant United States Attorney, New York, NY (Mary Jo White, United States Attorney, Paul A. Engelamyer and Ira M. Feinberg, Assistant United States Attorneys, of Counsel), *for Appellant.*

RAYMOND J. AAB, New York, NY (Carol Kahn, of Counsel), *for Defendants-Appellees.*

OAKES, *Senior Circuit Judge:*

The United States appeals from two orders entered by the United States District Court for the Southern District of New York dismissing counts one and two of the indictment charging Galo R. Velastegui and GMJ Travel & Shipping Corporation ("GMJ") (collectively "Defendants")[1] with engaging in an unlawful money transmitting business. The Second Order was issued after the Government moved for reconsideration and the district court adhered to its earlier ruling dismissing those counts. We determine that the particular conduct alleged in the indictment falls within the ambit of conduct that 18 U.S.C. § 1960 (a) makes criminal. Accordingly, we reverse.

BACKGROUND

This case involves the business of money transmitting. A money transmitting business receives money from a customer and then, for a fee paid by the customer, transmits that money to a recipient in a place that the customer designates, usually a foreign country. After the customer gives the money transmitter an amount to send to the designee, the transmitter notifies the "payer" with whom it has a contractual arrangement in the recipient country. The payer then notifies the designated recipient of the

---

[1]Velastegui is president of GMJ and its sole shareholder.

money, and pays the money to the designee at the payer's office. The transmitter then remits to the payer the amount paid to the designee, plus the payer's commission.

GMJ is a New York corporation that was employed as an agent of several licensed money transmitting businesses. It did not have a New York license authorizing it to engage in the direct transmission of money. Generally, GMJ's agency agreements appointed GMJ for the sole purpose of collecting money for transmission by the licensed principal. GMJ does not dispute that, in contravention of this agreement, it often sent funds left for transmission by its principals directly to Mexican payers. Additionally, the Government proffered in its motion for reconsideration that the evidence at trial would show (1) that GMJ had transmitted millions of dollars to recipients in Mexico and elsewhere, entirely outside of its agency relationships with licensed transmitters; (2) that it did not purport to act as an agent of any licensee when it made those transmissions; and (3) that it did not share commissions for those transmissions with any licensee. [2] As a result of GMJ's breachs of its agency agreements,

---

[2]There was no basis for the District Court to assume that GMJ , in transmitting money without a license, had done so only on behalf of an entity with which it had an agency agreement. On the government's appeal from an order dismissing an indictment, the facts alleged by the government must be taken as true. *See United States v. Rosengarten,* 857 F.2d 76, 78 (2d Cir. 1988). An indictment is sufficient if it contains the elements of the offense charged and fairly informs a defendant of the charge against him or her. *See United States v. Alfonso*, 143 F.3d 772, 776 (2d Cir. 1998). Here, the indictment charges Defendants with operating a money transmitting business in violation of section 1960 . Thus, Defendants are fairly informed that any money transmitting, including that done on behalf of licensees and that done for its own clients, that occurred in the specified time periods is covered by the indictment.

each principal canceled its agency contract with GMJ. At all times relevant to this indictment, however, GMJ operated as an agent of at least one New York state licensed money transmitting business.

Defendants were indicted on September 2, 1998, on three counts. They are charged with two counts of illegal money transmitting, in violation of 18 U.S.C. §1960(a) and 18 U.S.C. §2 (1999), and one count of money structuring, in violation of 31 U.S.C. §5324(a)(3) and (c)(2) (1999), and 18 U.S.C. §2.

On February 22, 1999, Defendants filed a motion to dismiss the indictment and to suppress statements made by Velastegui to agents upon his arrest. Defendants argued that prosecution under 18 U.S.C. § 1960 violates their due process rights because the transmittal of funds directly to beneficiaries in Mexico was not a reasonably clear violation of the statute. The district court granted Defendants' motion to dismiss counts one and two pursuant to the rule of lenity and denied Defendants' motion to dismiss count three and its motion to suppress Velastegui's statements. This appeal by the government followed.

DISCUSSION

Because a motion to dismiss on grounds that a criminal statute provides insufficient notice raises a question of law, we review the dismissal of the indictment by the district court *de novo. See Alfonso,* 143 F.3d at 775. Due process requires that a criminal statute "give fair warning of the conduct that it makes a crime." *Bouie v. City of Columbia,* 378 U.S. 347, 350-1 (1964). The rule of lenity, a manifestation of the fair warning requirement, "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier,* 520 U.S. 259, 266 (1997) the touchstone inquiry is "whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal," *id.* At 267. The rule "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *United States v. Shavani,* 513

U.S. 10, 17 (1994). If we find that the ambit of the criminal statute is ambiguous, the ambiguity should be resolved in favor of lenity. *See Rewis v. United States*, 401 U.S. 808, 812 (1971). Therefore, we must decide whether Defendants' conduct – the direct transmission of money to Mexico by an unlicensed agent of a state-licensed money transmitting business–falls clearly within the range of criminal liability under section 1960.

Title 18 U.S.C. §1960 was enacted in order to combat the growing use of money transmitting businesses to transfer large amounts of the monetary proceeds of unlawful enterprises. *See* S. Rep. No. 101-460, at 14 (1990), reprinted in 1990 U.S.C.C.A.N. 6645, 6658-59. The Statute provides, in pertinent part:

> (a) Whoever conducts, controls, manages, supervises, directs, or owns all or part of a business, knowing the business is an illegal money transmitting business, shall be fined in accordance with this title or imprisoned not more than 5 years, or both.
>
> (b) As used in this section —
>
> (1) the term "illegal money transmitting business" means a money transmitting business which affects interstate or foreign commerce in any manner or degree and–
>
> (A) is intentionally operated without an appropriate money transmitting license in the State where such operation is punishable as a misdemeanor or a felony under State law; or
>
> (B) fails to comply with the money transmitting business registration requirements under section 5330 of title 31, United States Code, or regulations prescribed under such section . . . . .

18 U.S.C. §1960. The statue makes it a federal crime to knowingly operate a money transmitting business in violation of state law where the state requires a license and makes unlicensed money transmitting punishable as a misdemeanor or felony. Therefore, we must look to New York law to determine whether Defendants were operating an illegal money transmitting business.

New York state law provides that it is illegal to receive money for transmission, or to transmit money, without a license issued by the Superintendent of Banks (the "Superintendent").[3] *See* N.Y. Banking Law §641 (McKinney 1999) ("[N]o person shall engage in the business of . . . Receiving money for transmission or transmitting the same, without a license therefor obtained from the superintendent as provided in this article . . . ."). The law imposes a misdemeanor penalty on whoever "violates or participates in the violation of any provisions of this article." *Id.* § 650(1) (McKinney 1971). A violation is elevated to a felony if the business knowingly received or transmitted a total of $10,000 or more in a single transaction, a total of $25,000 or more in a period of 30 days or less, or a total of $250,000 in a period of one year or less. *See id.* § 650(2)(b)(1) (McKinney 1999). A violation is a misdemeanor if the business knowingly received or transmitted lesser amounts. *See id.* §650(2)(a).

Under New York law, a licensed money transmitting business may conduct limited aspects of its business through agents or subagents that it designates, *see id.* §648(a) (McKinney 1971), who are not themselves required to be licensed, except in certain limited circumstances not applicable here, *see id.* §648(b), (c). Although agents are not required to be licensed, section 651-a narrowly circumscribes the activities which an unlicensed agent

---

[3]The Superintendent heads the New York State Banking Department, which is charged with implementation of all banking laws in the state. *See* N.Y. Banking Law §§ 11-12 (McKinney 1990).

may lawfully perform. This section provides that an agent must remit all money it receives on behalf of a licensed transmitter to that licensed transmitter, either directly or by depositing it into a bank account established for such remittances in the name of the licensed transmitter. *See id.* § 651-a (McKinney 1999). The Superintendents' regulations enacted pursuant to New York banking law underscore the limited money transmitting activities of an agent. Rule 406.3(e) requires "[e]very licensee which has appointed or designated agents . . . [to] require each agent under its written agency contract to conduct the authorized money transmission activities through the licensee." N.Y. Comp. Codes R. & Regs. tit. 3, § 406.3(e) (1995). Rule 406.5(a)(6) mandates that all agency contracts provide:

> that agents and subagents . . . are under a duty to act only as authorized under the agency contract and that an agent and subagent who exceeds its authority is subject to cancellation of the agency contract and may result in further disciplinary action against the licensee by the superintendent.

Id. § 406.5(a)(6). Accordingly, although agents of licensed money transmitting businesses need not be licensed in and of themselves, unlicensed agents are explicitly prohibited by state law from transmitting money directly.

New York law, therefore, makes the operation of an unlicensed money transmitting business either a misdemeanor or a felony, which in turn subjects the offender to federal criminal penalties under 18 U.S.C. §1960. It is Defendants' contention, however, that their conduct amounts to a failure to remit money and, although admittedly a violation of their agency agreements and a misdemeanor under state law, this failure to remit does not reasonably constitute the operation of an "illegal money transmitting business" as contemplated by section 1960. We disagree with that conclusion.

Our analysis begins with the language of the statute. *See*

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, ___, 199 S. Ct. 755, 760 (1999) ("in any case of statutory construction, our analysis begins with the 'language of the statute' " (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992))). Section 1960 applies categorically to *"[w]hoever"* knowingly conducts an illegal money transmitting business. 18 U.S.C. § 1960(a) (emphasis added). An "illegal money transmitting business" is defined, without exception, as a money transmitting business that is not licensed under state law in a state where a license is required. *See id.* §1960(b)(1)(A). There is nothing on the face of section 1960 that permits any exception for an unlicensed money transmitting business that is also an agent of a state licensee. By its plain language, section 1960 applies to Defendants because GMJ was transmitting money directly without a license.

In fashioning an exception under section 1960 for agents of licensed transmitter, the district court reasoned that because the direct transmission of funds led to the suspension of GMJ's agency agreements, the direct transmission of funds could not have amounted to operating a money transmitting business without an appropriate license. In so doing, the district court assumed that under New York law an agency agreement is the "functional equivalent" of a state license and therefor permits an agent to lawfully engage in money transmitting transactions. This reasoning does not comport with New York's statutory framework.

Section 641 provides that "no person shall engage in the business... of receiving money for transmission or transmitting the same, without a license . . . Nor shall any person engage in such business as an agent, except as an agent of a licensee . . . ." N.Y. Banking Law §641(1). Furthermore, although state licensees may utilize unlicensed agents in limited aspects of their business, agents are explicitly not permitted to transmit money directly under New York law. *See id.* § 651-a. Hence, an agency agreement with a licensed money transmitting business is *not* the functionally equivalent of a state-issued license. Because an

agency agreement with a licensed principal is not the same as a money transmitting license, Defendants were operating a money transmitting business without a license.

It is inconsequential that Defendants' direct transmission of money was also a breach of its agency agreements. Defendants' conduct should not be viewed through a myopic lens and characterized solely as a failure to remit money to its licenses *and* as direct money transmitting. Therefore, we conclude that a New York agent of a licensee who transmits money directly to a foreign country in contravention of New York state law and its agency agreement is operating a money transmitting business without a license as prohibited by section 1960.[4] Accordingly, section 1960 applies with sufficient clarity to comport with the constitutional fair notice requirement.

Defendants seek support for their agency argument in the Superintendent's regulations that provide that an agent acting

---

[4]Our holding does not mean that an agent could face federal criminal prosecution for innocent conduct in mistakenly transmitting money that it had received on behalf of a licensed principal, or for an isolated instance of improper transmittal of money. First, section 1960(a) requires that the unlicensed entity by "an illegal money transmitting *business*" (emphasis added) which insures that persons or entities cannot be prosecuted for a single, isolated transmission of money. Second, section 1960 defines an "illegal money transmitting business" as one "*intentionally* operated without an appropriate money transmitting license" (emphasis added), and requires that the defendant know the business is an "illegal money transmitting business." Whether or not this defense is available to Defendants here must be determined after factual development at trial and is not properly considered on an appeal of an order dismissing an indictment. *See Alfonso*, 143 F.3d at 777 (holding that "the sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment.")

outside of the scope of its agreement subjects itself to the cancellation of its agency contract and its *principal* to further action by the Superintendent. *See* N.Y. Comp. Codes R & Regs. tit. 3, § 406.5(a)(6) (1995). They also pont to a letter issued by the Superintendent in September of 1998 warning that the direct transmission of money by agents may result in the revocation of the principal's license, the imposition of fines, and a referral to the appropriate prosecutorial agency for criminal investigation. Defendants contend that one must infer from the regulation and letter that only the licensee is subject to prosecution when its unlicensed agent transmits money directly. This argument is unavailing.

The regulation does not address or purport to address the question of whether an unlicensed agent commits a crime. Indeed, the language of the regulation simply underscores that agents lack authority under state law to transmit money directly because it provided that an agent "who exceeds its authority is subject to cancellation of the agency contract and may result in further disciplinary action against the licensee by the superintendent." N.Y. Comp. Codes R. & Regs. tit. 3, §406.5(a)(6) (1995). We reject the reasoning that simply because a regulation issued by the Superintendent, who is not responsible for criminal investigations or prosecution, warns only against disciplinary action for the licensee, criminal prosecution of the agent is foreclosed. Furthermore, in support of the Government's motion for reconsideration, the Secretary submitted a letter in which the Secretary opined that an agent who transmits money directly without a state license violates New York Banking law. Thus, the regulation and the September 1998 letter do not override the plain language of section 651-a that makes transmitting money directly by an unlicensed agent of a licensed principal unlawful.

The conclusion that Defendants were transmitting money without an appropriate money transmitting license as required for a conviction under section 1960 is especially appropriate on these facts. In support of its motion for reconsideration, the Government proffered that the evidence would show at trial that Defendants

were not transmitting money on behalf of any entity with whom they had an agency agreement and did not share any of the commissions from these transactions with the principals. Instead, Defendants were operating a money transmitting business quite separate and apart from the licensed principals with whom they had agency agreements. To hold that section 1960 does not apply to Defendants' conduct in this case would crate a loophole in section 1960 whereby a business, simply by having a single agency agreement with a licensed money transmitter, could transmit money on its own without a state license and avoid prosecution under federal law.

CONCLUSION

The direct transmission of funds in violation of New York state law by an agent of a licensed money transmitter falls within the ambit of conduct forbidden by section 1960. Because section 1960 therefore applies with sufficient clarity to Defendants' conduct, we reverse the district court and reinstate counts one and two of the indictment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

-against- :

GALO R. VELASTEGUI and GMJ TRAVEL & SHIPPING CORP., INC., :

Defendants. :

---------- X

SHIRA A. SCHEINDLIN, U.S.D.J.:

Defendants Galo R. Velastegui and GMJ Travel and Shipping Corp. ("GMJ") move to dismiss the indictment filed against them on September 2, 1998. They are charged with two counts of illegal money transmitting in violation of 18 U.S.C. §§ 1960 and 2 and one count of structuring of currency transactions in violation of 31 U.S.C. § 5324(a).[1]

Defendants first contend, with regard to the transmitting counts, that during the period covered by the indictment GMJ operated as an authorized agent of one or more state-licensed money transmitters.[2] As a result, defendants argue, they did not transmit money illegally within the meaning of 18 U.S.C. §1960.[3]

---

[1]Defendants also move to suppress certain of Velastegui's post-arrest statements. An evidentiary hearing on that matter, which remains sub judice, was held on March 25, 1999.

[2]This is permitted by Section 648 of the New York Banking Law. See N.Y. Banking Law § 648(a).

[3]"Whoever conducts, controls, manages, supervises, directs, or owns all or part of a business, knowing the

Defendants also contend that the criminal sanctions imposed by the state and federal transmitting statutes apply only when the illegal transmitting constitutes money laundering. Neither defendant was charged with money laundering. Defendants assert that there is insufficient notice that unlicensed money transmitting, in the absence of money laundering, would subject an offender to criminal sanctions.

Defendants next contend, with respect to the structuring count, defendants contend that because the bank in which they deposited funds filed currency transaction reports ("CTRs"), they cannot be guilty of structuring. Defendants also claim that they subjectively believed the bank would file such reports, even when it did not. In sum, defendants assert that they lacked the intent to violate 31 U.S.C. §5324(a).[4]

---

business is an illegal money transmitting business, shall be fined in accordance with this title or imprisoned not more than 5 years, or both." 18 U.S.C. §1962)a). "[T]he term' illegal money transmitting business' means a money transmitting business which affects interstate or foreign commerce in any manner and degree and--(A) is intentionally operated without an appropriate money transmitting license in a State where such operation is punishable as a misdemeanor or a felony under State law . . . . " Id. § 1962(b)(1).

[4]"No person shall for the purpose of evading the reporting requirements of section 5313(a) . . . cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a) [or] . . . structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions." 31 U.S.C. §5324(a).

I. Factual Background

Galo R. Velastegui serves as the sole shareholder and officer of GMJ, a New York corporation engaged in the money transmitting business. See Affidavit of Galo Velastegui ("Velastegui Aff.") at ¶ 2. GMJ has offices at 1633B Lexington Avenue in Manhattan, as well at 82C Bridge Avenue in Red Bank, New Jersey, See Government's Memorandum of Law in Opposition to Defendants' Motion to Dismiss and Suppress ("Gov. Mem.") at 1. GMJ started a money transmitting business in May 1995. See Velastegui Aff. at ¶ 4.

A money transmitting business, or money remitter, receives money from a customer and then sends that money to a recipient in a place that the customer designates. See Gov. Mem. at 1. Typically, after a customer gives a transmitter an amount of money to send to the designated party, usually in a foreign country, the transmitter notifies a "payer" in that country, who then pays the money to the designee upon his or her arrival at the payer's office. See Velastegui Aff. at ¶ 7. The transmitter then remits to the payer a balance equal to the amount paid the designee, plus the payer's commission. See id.

GMJ never obtained a license from the New York State Banking Department to operate as a money transmitter. See Defendants' Memorandum of Law in Support of Motion to Dismiss and Suppress ("Def. Mem.") at 2. However, at different times since the commencement of its money transmitting business, GMJ entered into agency agreements with various licensed money transmitters as permitted by the New York Banking Law. [5] See Velastegui Aff. at ¶ 14. Specifically, GMJ had an agency agreement with Remesas Quisqueyana, Inc. ("RQI"), in effect from May 19. 1995 to June 16, 1997; with RIA Telecommunications of New York, Inc. ("RIA"), in effect from

---

[5] See N.Y. Banking Law §648(a).

August 17, 1995 to October 1997; with BHD Corp. ("BHD"), in effect from June 6, 1996 to December 1997; with Envios De Valores La Nacional ("Nacional"), in effect from March 10, 1998 to August 17, 1998; and with American Express Money Gram ("AmEx"), in effect from September 1995 to date. See id.

Generally, these agreements appointed GMJ as an agent for the sole purpose of collecting money for transmission by the licensed principal. See Velastegui Aff. at ¶ 17. For example, GMJ's agreement with RQI obligated GMJ to deliver to RQI, through deposit into its bank account or otherwise, all "funds . . . Left with [GMJ] for transmission by RQI" at the end of each day. See Def. Mem., Ex. F at 3. GMJ's agreements with RIA and BHD contained similar provisions.[6] See id., Ex G. at 5, 18. In the event GMJ exceeded its authority under any of these agreements, each provided for cancellation by the principal. See id., Ex. F at 13; Ex. G at 7, 20.

GMJ, in contravention of these agreements, often sent funs left for transmission by its principals directly to Mexican payers. See Velastegui Aff. at ¶ 16. One of the payers to which GMJ directly sent funds was Envios GMJ, a Mexican company owned in part by defendant Velastegui, See id. at ¶ 9. As a result of GMJ's branches, RQI, BHD, and Nacional each canceled its agency contract with GMJ. See id. at ¶ 14. The indictment charges defendants with one count of illegal money transmitting for the period of January 2, 1997 to December 9, 1997, and another count for the period of June 26, 1998 to July 20, 1998. See Indictment at ¶¶ 4, 6.

---

[6]Defendants have not submitted any evidence of the terms of their agency agreements with Nacional and AmEx, but have merely asserted that such agreements exist. See Velastegui Aff. at ¶ 14. The content of these agreements is not essential to the resolution of the issues raised by defendants' motion.

The indictment also charges GMJ with structuring its deposits into two of its accounts at the Ponce de Leon Federal Savings Bank ("Ponce"), at 1925 Third Avenue in Manhattan, for the purpose of evading the currency reporting requirements of 31 U.S.C. § 5313 (a). See id. at ¶ 8. That statute requires a financial institution that receives more than $10,00.00 in a single deposit to report that transaction to the Internal Revenue Service ("IRS"). GMJ allegedly violated this statute by depositing amounts of just under $10,000.00 nearly 350 times between September 23, 1996 and October 17,1997, totaling nearly $3 million. See id. GMJ asserts that it also made fifty-two deposits exceeding $10,000.00 during that period. See Velastegui Aff. at ¶ 20, Ex. B. GMJ further asserts that Ponce filed CTRs with the IRS for each of the fifty-two deposits, as well as for multiple deposits made by GMJ on a single day, when the total exceeded $10,000.00 See id. at ¶ 21. Ex. C. Finally, Velastegui alleges that, when he opened GMJ's accounts at Ponce, he was notified by a bank officer that Ponce would file CTRs for all deposits in a single day exceeding $10,000.00. See id. at ¶ 22.

II. Discussion

A. Standard for Dismissal of an Indictment

Generally, a factually valid indictment returned by a duly constituted grand jury suffices to call for a trial on the merits of the charges set forth therein. See Costello v. United States, 350 U.S. 359, 363 (1956). An indictment need only provide sufficient detail to protect the defendant against double jeopardy, and to state the elements of the charged offense to permit the preparation of a defense. See United States v. Tramunti, 513 F.2d 1087, 1113 (2d Cir. 1975). Thus, a defendant may not challenge an indictment on the ground that it is not supported by adequate or competent evidence. See Costello, 350 U.S. at 359; See also United States v. Alfonso, 143 F.3d 772, 777 (2d Cir. 1998) ("the sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment").

The government claims that defendants are moving to dismiss this indictment "on the ground that no factual 'basis exist[s]' for [these charges]." See Gov. Mem. at 5, quoting Affidavit of Raymond J. Aab, attorney for defendants ("Aab Aff.") at ¶ 2. Hence, the government argues, defendants' motion should be denied as "clearly premature" under the Costello standard. See id. at 6.

A defendant, however, may raise any defense "capable of determination without the trial of the general issue" by pretrial motion. Fed. R. Crim. P. 12(b). A defense is "capable of determination" if the trial of the general issue of guilt "would be of no assistance in determining the validity of the defense." United States v. Covington, 395 U.S. 57, 60-61 (1969). Similarly, a pretrial motion "shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict." Fed. R. Crim. P. 12(e). "Good Cause" to postpone ruling on a pretrial motion exists when a defendant's claims "are substantially founded upon and intertwined with the evidence to be presented at trial." United States v. Williams, 644 F.2d 950, 953 (2d Cir. 1981).

While some of the defenses raised in the motion remain incapable of determination at this stage in the proceedings, others bear little relationship to the general issue of guilt and must be resolved now. The "insufficient notice" claim squarely presents an issue of law determinable before trial. Defendants' contention that they lacked the requisite intent to violate the anti-structuring statute, however, raises a question of fact that must be determined at trial.

B. The Money Transmitting Counts

Federal law provides criminal penalties, in the form of fines and imprisonment, for whomever "conducts, controls, manages, supervises, directs, or owns all or part of a business, knowing the business is an illegal money transmitting business." 18 U.S.C. §1960(a). An illegal money transmitting business is" a

money transmitting business which affects interstate or foreign commerce to any degree" and "is intentionally operated without an appropriate money transmitting license in a State where such operation is punishable by a misdemeanor or felony under State law." Id. § 1960(b). The indictment charges that defendants "did conduct, control, manage, supervise, and direct, and [Velastegui] did own all and part of, a business, knowing the business was an illegal money transmitting business" from January 2 to December 9, 1997 and from June 26 to July 20, 1998, in violation of 18 U.S.C. §1960. Indict. at §§ 4,6.

In making these charges, the indictment alleges that Velastegui owned the business while

> knowing the business was an illegal money transmitting business, to wit, a money transmitting business which affected interstate and foreign commerce in any manner and degree and was operated intentionally without an appropriate money transmitting license in a State where such operation is punishable as a misdemeanor under State law, to wit the State of New York.

Id. Article XIII-B of the New York Banking Law provided that "no person shall engage in the business ... of receiving money for transmission or transmitting the same without a license therefor obtained from the superintendent ... nor shall any person engage in such business as an agent, except as an agent of a licensee...." N.Y. Banking Law §641. The law permits a licensee to conduct its business "through or by means of such agents and subagents at the licensee may from time to time designate or appoint." Id. § 648(a). Hence, the law does not require an agent or subagent of a licensee to obtain a license. See id. § 648 (b). Finally the law imposes a misdemeanor penalty on whomever "violates or participates in the violation of any of the provisions of this article." Id § 650 (1). Specifically, anyone who "engages in the business of receiving money for transmission or transmitting the same...without a license therefore obtained from the Superintendent as provided in this article, shall be guilty of a Class

A misdemeanor." Id. §650(2)(a). Receiving for transmission $10,000.00 or more in a single transaction, $25,000.000 or money within a thirty-day period, or $250,000.000 or more within a year in violation of section 650(2)(a) subjects the offender to Class E felony charges. See id. § 650(2)(b)(1).

New York law makes the operation of an unlicensed money transmitting business either a misdemeanor or a felony, which in turn subjects the offender to federal criminal penalties under 18 U.S.C. §1960. Defendants contend, however, that because GMJ was an agent of one or more licensed money transmitters, and thus exempt from the licensing requirement under section 648(b), it did not engage in an unlicensed money transmitting business within the meaning of the New York Banking Law. The government counters that the New York Banking Law only permits the agent of a licensed principal to transmit money to its principal. Indeed, another section of Article XIII-B provides:

> Each agent or subagent of a licensee which sells any New York instruments...issued by such licensee shall, and each licensee shall so require each of its agents which sells any New York instruments...issued by such a licensee to ...remit the face amount of New York instruments to such licensee...For the purposes of this section, remittance shall include either direct payment of such funds to the licensee or the deposit of such funds in a [bank], in the account in the name of such licensee....

New York Banking Law § 650-a. The definition of "payment instrument" includes any "order for the payment or transmission of money." New York Banking Law § 640(5). The superintendent's regulations, enacted pursuant to Article XIII-B, further limit the money transmitting activities of an agent. Rule 406.3(e) provides that every licensee "require each agent under its written agency contract to conduct the authorized money transmission activities through the licensee." N.Y. Comp. Codes

R. & Regs. Tit. 3, § 406.3(e). Furthermore, Rule 406.5(6) requires that all agency agreements provide

> that agents and subagents are under a duty to act only as authorized under the agency contract and that an agent and subagent who exceeds its authority is subject to cancellation of the agency contract and may result in further disciplinary action against the licensee by the superintendent.

Id. § 406.5(3). Defendants freely admit that GMJ sent funds left for transmission by its principals directly to Mexican payers, in violation of both section 651-a and GMJ's agency agreements with its principalis. See Velastegui Aff. ¶ 16. The government concludes that this conduct amounts to operating an unlicensed money transmitting business under New York Law, punishable by at least misdemeanor penalties, and thus subjects the defendants to the criminal section of 18 U.S.C. § 1960.

Section 1960, however, criminalizes only the operation of a money transmitting business "without an appropriate money transmitting license in the State where such operation is punishable by a misdemeanor or felony under State law." 18 U.S.C. §1960. The New York Banking Law requires an agent to remit to the licensee the amount of such transmission sold. See N.Y. Banking Law §651-a. The failure to remit as required is punishable as a misdemeanor. See id. §650(1).("any person who violates...any provision of this article...shall be guilty of a misdemeanor"). Nevertheless, unless such a failure to remit constitutes operation of a money transmitting business" without an appropriate money transmitting license," it does not fall within the ambit of conduct prohibited by 18 U.S.C. §1960. This presents a legal question of apparent first impression.

In construing an ambiguous criminal statute, a court must adhere to the rule of lenity, which provides that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis v. Untied States, 401 U.S. 808, 812

(1971). Applying the rule "ensure that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminally liability." Liparota v. United States, 471 U.C. 419, 427 (1985). The Supreme Court has recently explained the rule of lenity as one of three manifestations of the constitutional requirement that criminal statutes provide fair warning. See United States v. Lanier, 520 U.S. 259, 266 (1997). According to the Court,

> First, the vagueness doctrine bars enforcement of a 'statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application'....Second, as a sort of 'junior version of the vagueness doctrine,'...the rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered....Third, ...due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has disclosed to be within in its scope....

Id. Consequently, the Lanier Court defined the standard for a fair notice inquiry as "whether the statute, either standing alone or as reasonably construed, made it reasonably clear at the relevant time that the conduct was criminal." Id. at 267.

Defendants contend that 18 U.S.C. §1960 does not make reasonably clear that failing to transmit funds though its principals as required by N.Y. Banking Law § 651-a constitutes the criminal activity of operating a money transmitting business without an appropriate money transmitting license. In support of their position, they note that the superintendent's regulations provide that an agent acting outside of the scope of its agreement subjects itself to the cancellation of its agency contract and its principal to further action by the superintendent. See N.Y. Comp. Codes R. & Regs. Tit. 3, §406.5(e). Indeed, RQI, RIA, BHD, and Nacional

each canceled its agency contract with GMJ as a result of its direct transmission of funds to payers. See Velastegui Aff. at ¶ 17. Nevertheless, defendant retained an agency agreement with at least one licensed principal at all times relevant to the indictment.

Defendants argue that because the direct transmission of funds led to the suspension of GMJ's agency agreement – the functional equivalent of "licenses" under Article XIII-B –the direct transmission of funds could not have amounted to operating a money transmitting business without an appropriate license under a reasonable construction of 18 U.S.C. § 1960. I agree. The statute fails to make reasonably clear that operating an otherwise "licensed" money transmitting business in violation of other sections of the state banking laws, subjects the offender to federal criminal penalties. Accordingly, the portion of the indictment charging the defendants with violating 18 U.S.C. §1960 contravenes the constitutional fair notice requirement and must be dismissed.

C. The Structuring Count

A domestic financial institution involved in a transaction for the payment, receipt, or transfer of United States currency is required to file a report on the transaction under certain circumstances prescribed by the Secretary of the Treasury. See 31 U.S.C. §5313(a). Pursuant to this statue, such institutions must file a CTR with the IRS for each deposit, withdrawal, or exchange of currency in excess of $10, 000.00. See 31 C.F.R. § 103.22(a)(1). Structuring or attempting to structure transactions with a financial institution for the purpose of evading these reporting requirements subjects the offender to criminal penalty. See 31 U.S. C. §5324(c). Structuring refers to the practice of dividing an amount of currency exceeding $10,000.00 into amounts of less than $10,000.00. See 31 C.F.R. §103.11(gg). Criminal penalties are also required for anyone who, for the purpose of evading the reporting requirements, causes or attempts to cause a financial institution to fail to file a CTR. See 31 U.S.C. §5324(a).

The indictment charges that GMJ "unlawfully, willfully, and for the purpose of avoiding the reporting requirements...did structure...and attempt to structure...transactions with one or more domestic financial institutions...." Indictment at ¶ 8. The indictment then enumerates a series of deposits in amounts just shy of $10,000.00 that GMJ made into its accounts at the Ponce de Leon Federal Savings Bank between September 23, 1996 and October 17, 1997. See id. GMJ moves to dismiss this count of the indictment on the grounds that it lacked the intent required to violate the statute. In support of this assertion, GMJ relies on three essential facts: one, that GMJ also made many deposits at Ponce in excess of $10,000.00, during the period of the indictment; two, that GMJ believed Ponce would file CTRs whenever GMJ's aggregate amount of money deposited in a single day exceeding $10,000.00; three, that the amounts of GMJ's deposits at Ponce depended solely upon the amounts of monies GMJ's clients gave it for transmission.

GMJ has submitted virtually no evidence in support of these asserted facts. Even if it had, good cause exists to postpone ruling on this part of GMJ's motion. See Williams, 644 F.2d at 953 (good cause exists when a defendant's claims" are substantially founded upon and intertwined with the evidence to be presented at trial"). Moreover, pretrial motions are not the appropriate devices for attacking the sufficiency of the government's evidence, because the government has not yet had the opportunity to marshal and present its proof. See United States v. Alfonso, 143 F.3d 772, 776 (2d Cir. 1998). The indictment, in tracking the language of the statute, charges GMJ with an intent to violate the reporting requirements of 31 U.S.C. §5324. When the charging language sets forth all the requisite elements of the offense without ambiguity, a motion to dismiss must be denied. See Hamling v. United States, 418 U.S. 87, 117 (1974). Here, the currency structuring count satisfies this standard. Therefore, GMJ's motion to dismiss this count of the indictment is denied.

III. Conclusion

For the foregoing reasons, defendant's motion to dismiss the indictment is granted inpart and denied inpart. A conference is scheduled for May 11, 1999 at 4:30 p.m.

SO ORDERED:

/s/
Shara A. Scheindlin
U.S.D.J.

Dated: New York, New York
April 28, 1999